IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-749

UNITED STATES OF AMERICA,
Appellant,

v.

ROBERT WILLIAM KRAS,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

KALMAN FINKEL
The Legal Aid Society
Civil Appeals Bureau
267 West 17th Street
New York, New York 10011
Attorney for Appellee

On the Brief:
JOHN E. KIRKLIN
LEON B. POLSKY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINION BELOW

The opinion of the district court (J.S. App. A pp. 11-26) is reported at 331 F. Supp. 1207.

JURISDICTION

The judgment of the district court declaring unconstitutional, as applied, the filing fee requirement of the

federal bankruptcy law [1] was entered on September 13, 1971 (J.S. App. A. p. 11). A notice of appeal was filed on October 8, 1971 (J.S. App. B. p. 27) and probable jurisdiction was noted on February 22, 1972 (App. 11; 405 U.S. 915). The jurisdiction of this Court rests upon 28 U.S.C. §1252.

QUESTIONS PRESENTED

1. Whether the provisions of the federal bankruptcy law requiring the payment of a filing fee deny appellee a procedural due process hearing in violation of his Fifth Amendment Due Process rights.

2. Whether the provisions of the federal bankruptcy law requiring the payment of a filing fee deny this indigent bankrupt access to court in violation of his Fifth Amendment rights.

STATUTE AND ORDER INVOLVED

The pertinent provisions of the Bankruptcy Act, 11 U.S.C. 1 *et seq.*, and of this Court's General Order in Bankruptcy No. 35, are set forth in the appellant's appendix at pp. 29-32.

STATEMENT

In order that the issues may be seen in proper perspective, the appellee submits the following detailed presentation of the facts:

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[1] The relevant provisions of the bankruptcy law are set forth in the appendix at pp. 29-32 in the Government's brief.

On May 28, 1971 Robert William Kras, appellee, sought to file a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York. Accompanying the petition was an affidavit describing his financial plight. Mr. Kras resides with his wife, his two young children, his mother and her young child in a 2½ room apartment. His youngest child is afflicted with cystic fibrosis. He supports them solely on a total semi-monthly public assistance allowance of $183. Rent consumes $102 monthly and the remaining money is expended on day-to-day necessities. Mr. Kras' sole assets are $50 worth of essential household goods[2] and a couch in storage on which payments are owed.

Mr. Kras also detailed the difficulties he has encountered in finding employment. Appellee's last steady job was in 1969 as an insurance agent with Metropolitan Life Insurance Company. He was discharged from Metropolitan in 1969, "because premiums which I had collected were stolen from my home by an intruder and I was unable to make up the amount to Metropolitan" (App. 4).

Since that time Mr. Kras has sought steady employment in New York City and Connecticut, but his efforts to secure employment have been frustrated primarily by the unfavorable references given by Metropolitan to prospective employers. During 1969 and 1970, appellee was only able to obtain odd jobs, from which he earned approximately $600. Appellee's wife was employed until March, 1970, but stopped working when she had a baby. Her time is now devoted to caring for her handicapped son.

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[2] Exempt from distribution in bankruptcy pursuant to 11 U.S.C. §24 and New York Civil Practice Laws and Rules 5205.

Mr. Kras' total indebtedness is $6428.69, of which the claim of Metropolitan Life Insurance Company amounts to $1012.64. In his affidavit Mr. Kras also explained the reason he seeks a bankruptcy discharge at the earliest possible time:

> "I earnestly seek a discharge in bankruptcy of substantial indebtedness in the amount of $6428.69 in order to relieve myself and my family of the distress of financial insolvency and creditor harassment and in order to make a new start in life. It is especially important that I get a discharge of my debt to Metropolitan Life Insurance Company soon, because until that is cleared up Metropolitan will continue to falsely charge me with fraud and give me bad references which prevent my getting employment. When I do get a job I want to be able to spend my wages for the support of myself and my family and for the medical care for my son, instead of paying them to my creditors and forcing my family to remain dependent on welfare (App. pp. 5-6).

Mr. Kras was unable by saving or borrowing to accumulate funds above those required to meet the day-to-day subsistence needs of himself and his family, and the New York City Department of Social Services refused to make an allotment for bankruptcy filing fees. Accordingly, at the time he attempted to file his petition in bankruptcy, Mr. Kras stated that he could neither pay the $50 filing fee in lump sum nor state the terms upon which he could promise to pay in installments (App. 4-6), as required before his petition could be filed (11 U.S.C. §§68(c)(1), 76(c), 80(a); Supreme Court General Order in Bankruptcy No. 35(4)). Mr. Kras' motion for leave to file his petition and proceed in bankruptcy without payment of any of the filing fees (App. 3) was referred to District Judge Travia for determination. See *In re Kras*, 331 F. Supp. 1207, 1208 (E.D.N.Y., Sept. 13, 1971).

By decision and order of September 13, 1971, District Judge Travia held that the filing fee requirement is unconstitutional as applied to Mr. Kras and ordered the bankruptcy petition filed and referred to a referee without Mr. Kras' prepayment of any filing fee. The Court further directed the referee to make provision for the survival of petitioner's obligation to pay the filing fee. *In re Kras,* 331 F. Supp. at 1213. Mr. Kras' petition was referred to Referee Manuel J. Price, who ordered that Mr. Kras be allowed to conduct all necessary bankruptcy proceedings up to but not including actual discharge (App. 9-10). None of Mr. Kras' creditors appeared before the referee at the first and only meeting of creditors to make objections, and, accordingly, only the filing fee requirement presently stands between Mr. Kras and the discharge of all of his scheduled debts.

ARGUMENT

I.

THE FILING FEE REQUIREMENTS OF THE FEDERAL BANKRUPTCY LAW DENIES APPELLEE A PROCEDURAL DUE PROCESS HEARING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

This Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), struck down as an unconstitutional infringement upon rights guaranteed by the Due Process Clause of the Fourteenth Amendment a Connecticut statute that foreclosed to an indigent the only available forum capable of effectuating a change of his marital status. The factors considered by the majority of the Court in *Boddie* were the undisputed bona fides of appellants' indigency, their desire to use the judicial process to obtain a divorce, the state monopoly over the relief, the importance of the

interest at stake, and the absence of any countervailing overriding governmental interest.

Here Mr. Kras, appellee, because of his dire indigency is barred by the bankruptcy filing fee requirement from gaining access to the bankruptcy court to have his status changed from that of an harassed debtor to one of an individual unhampered by overwhelming indebtedness.

It is really discernible upon an analysis of this Court's opinion in *Boddie* that the factors underlying *Boddie* are equally present in this case.

A. Bona Fide Claim of Indigency

Mr. Kras stated in his sworn affidavit that all the payments he receives from public assistance are needed to cover his rent and other day-to-day necessities. Appellee further said that there was no way for him to borrow the money. As with the appellants in *Boddie* the welfare income of Mr. Kras and his dependents "barely suffices to meet the costs of the daily essentials of life and includes no allotment that could be budgeted for the expense to gain access to the court . . . " *Boddie, supra*, 401 U.S. 372-73. The Government has at no point disputed Mr. Kras' statement as to the facts and the extent of his indigency and his inability to pay the filing fee either in lump sum or in installments.[3]

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[3]District Judge Travia concluded that in view of the extreme poverty of Mr. Kras it was unnecessary to even consider whether he need sell any exempt assets to meet the fee requirements or whether there is a constitutional standard for determining indigency. 331 F. Supp. at 1213.

B. Bona Fide Desire By Kras To Be Discharged in Bankruptcy

It is also undisputed that Mr. Kras genuinely wants a discharge in bankruptcy in order to help him gain employment and once employed to use his wages for the benefit of his family instead of having them paid to creditors.

C. Monopoly of Forum Over Relief

The bankruptcy court is the exclusive avenue for obtaining a discharge of indebtedness under the Bankruptcy Act. 11 U.S.C. §11. The Bankruptcy Act is a national act. Congress and the framers of the Constitution intended that all state insolvency laws be supplanted by one uniform set of laws in the hands of one court. See *The Federalist*, No. 42 (Cooke Ed., 1961 at 282, 266-87).

The Government in its brief has attempted to distinguish divorce from bankruptcy on the ground that while a divorce "may be obtained only through a judicial proceeding, a discharge in bankruptcy is only one of the ways of dissolving the debtor-creditor relationship." Brief, p. 23.

Although *Boddie* was decided on the specific facts presented, unquestionably the underlying principles in *Boddie* embrace all situations where, as here, there are no "recognized effective alternatives" (*Boddie*, 401 U.S. at 376) to the judicial proceeding for obtaining the desired relief. Realistically for Mr. Kras and other indigent debtors the bankruptcy court is the only available avenue for emancipation from their crushing indebtedness.

It is unrealistic for the Government to argue that bona fide indigents can effectively resolve their dispute with

their creditors without the benefit of the bankruptcy court. There is no viable alternative to the bankruptcy court for impoverished individuals. They have neither any present funds nor any immediate prospects of future funds that would give them any conceivable leverage or bargaining position in dealing with their creditors. Absent the availability of the relief under the Bankruptcy Act and the enforcement power of the bankruptcy court, these debtors have little chance of working out on their own an arrangement acceptable to their creditors, each of whom is anxious to have his claim satisfied at the expense of the others.

The fact that the United States Congress felt the need to legislate in the debtor-creditor area by creating a statutory vehicle for relieving an individual of overwhelming indebtedness demonstrates the gross inadequacies of private arrangements.

In this case, in particular, it is manifestly absurd to argue that Mr. Kras either can personally solve his dispute with his creditors or can without filing for a bankruptcy discharge wait until he can afford the payment of the fee. Mr. Kras finds himself under unique circumstances that make private negotiation between Mr. Kras and his creditors utterly impossible as a means of relieving him of his indebtedness. It cannot be expected that Metropolitan Life Insurance Company, a major creditor who has questioned the circumstances surrounding the lost premiums and who has therefore given appellee unfavorable references, will drop its claim. As to the other creditors Mr. Kras has simply nothing to offer in return for the abandonment or modification of their claims. Any abandonment or reduction of the claims by the creditors against an assetless debtor would be an act of pure charity by a creditor.

Thus for Mr. Kras and others like him the bankruptcy court proceeding is in reality the "only available one" for securing release from indebtedness. *Boddie, supra,* 401 U.S. at 377.[4]

D. Interest at Stake

The Government also asserts that it is permissible to bar individuals from the opportunity to be heard on their claimed right to a bankruptcy discharge because "the right to a discharge in bankruptcy, important though it may be, does not involve an interest as fundamental as that involved in *Boddie.*" Brief, p. 25.

The Government has misconstrued the root meaning of *Boddie.*

The only novel aspect of this Court's decision in *Boddie* was the recognition that a would-be plaintiff who seeks access to the judicial process to enforce a claimed

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[4]Although substantially abandoning that position in its Brief, the Government in its Jurisdictional Statement (pp. 8-9) implies that there is a constitutionally-significant difference between a federal bankruptcy court and the Connecticut divorce courts. The suggested dichotomy is clearly a false one. The bankruptcy referee is empowered to hear and determine disputes between the bankrupt-debtor and his creditors relating to a transaction which gave rise to a particular indebtedness. 11 U.S.C. §§1(9), 1(10), 1(11), 11, 32, 35(a)(2), 35(a)(4), 35(a)(8), and 35(c)(2). See *Pepper v. Litton,* 308 U.S. 295, 304 (1939); *United States Fidelity & Guaranty Company v. Bray,* 225 U.S. 205, 217 (1912). While it may not be the typical bankruptcy proceeding in which the debtor and his creditors confront each other in an adversary posture, this is no less true of the typical default divorce proceeding, which is not really a resolution of a dispute but merely a legal formulation of an arrangement worked out between parties only nominally in legal conflict with each other.

right where there are no effective alternative means to securing relief is entitled to the full panoply of fundamental due process safeguards which have repeatedly been held by this Court to protect defendants compelled to defend their interests.[5] Once the right to a traditional procedural due process hearing attaches, it is constitutionally impermissible for this Court to establish, as the Government suggests, an arbitrary hierarchy of interests in statutory rights as a sound basis for selectively applying the fundamental principles of due process. As this Court recently noted, "it is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that by its own light are 'necessary'." *Fuentes v. Shevin*, 40 U.S.L.W. 4692, 4699 (1972).

Appellant would have each court, and in every case, weigh the class of action against some elusive yardstick of fundamental rights forever anchored to divorce as the standard for what is fundamental. Even if courts were able to establish with confidence some theoretical order of priorities of interest, they would still be faced with the need for realistic appraisal of the interest at stake for the particular individual. Courts would be forced into deciding whether the interest protected by one contract action is a more significant one than the interests involved in some other contract action. Even more troublesome would be the problem of responsibility for litigating the question of whether a fundamental right is involved. Where the litigant opposing the indigent party is a government, it can be expected that the latter would raise the question in good faith; however, if the party

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[5] See *Fuentes v. Shevin*, 40 U.S.L.W. 4692 (1972); *Boddie v. Connecticut, supra*, 401 U.S. at 378-79, and cases cited.

opposing the indigent is a private litigant, it is not unreasonable to anticipate the raising of the question as part of the general resistance to the indigent's claim.

Accordingly, the Government's suggestion that the courts selectively apply fundamental rights is both practically unworkable[6] and constitutionally indefensible.

In any event, there is no question that appellee's right to a discharge in bankruptcy is a sufficiently important interest both to himself and to society to entitle him to the meaningful hearing traditionally guaranteed by the Due Process Clause.

One of the prime objects and paramount purposes of the Bankruptcy Act is to free the worthy debtor from the burden of unpaid debts. It has repeatedly been recognized by this Court that the substantial and fundamental purpose underlying the bankruptcy law is to give a debtor a "... new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244-245 (1934); *Lines v. Frederick*, 400 U.S. 18 (1970).

The purposes and goals of allowing one's debts to be discharged are not confined to economic rehabilitation. There are far-reaching social and psychological benefits encompassed in giving an individual the opportunity to begin afresh by having his failure forgiven and maybe forgotten. He no longer fears creditor harassment, law-

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[6]Cf. *Lynch v. Household Finance Corp.*, 40 U.S.L.W. 4335, 4339 (1972). "A final compelling reason for rejecting a 'personal liberties' limitation upon Section 1343(3) is the virtual impossibility of applying it." See also *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954 (1971).

suits and wage garnishments.[7] Without a discharge of debts, an individual, like appellee, who finds himself overwhelmed by his debts and harassed by his creditors becomes immobilized. Everywhere he turns his is confronted by failure and frustration. He sees no way to extricate himself from his unfortunate plight. Relief of his debts by a discharge in bankruptcy will result in a change of status from that of a debt-ridden failure to one of a potential rehabilitated and productive member of society. This change of status from an overwhelmed debtor to a potential solvent, useful member of society is of no less importance to Mr. Kras than a divorce is to a person trapped in an unhappy marriage. The substantial importance to the appellee of a discharge in bankruptcy is amply demonstrated by the magnitude and circumstances of his indebtedness and by his concern with relieving the stress of creditor harassment and his desire to make a new start in life. It is also in society's best interest that Mr. Kras become financially solvent rather than wallow in his debts:

> "The power of the individual to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right. To preserve its free exercise is of the utmost importance, not only because it is a fundamental private necessity, but because it is a matter of great public concern." *Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).[8]

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[7] Title II of the Consumer Protection Act, 15 U.S.C. §1671 *et seq.*, prohibits an employer from discharging an employee who is subject to only one wage execution, but does not afford similar protection to the prospective employee or to the employee subject to more than one wage execution.

[8] Society receives no benefit from the continuation of Mr. Kras' status as a public charge. Cf. *Atkins v. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948).

Mr. Kras receives an additional benefit from an early discharge in bankruptcy. Each time Mr. Kras applies for a job he must overcome a seemingly insurmountable barrier, namely that he is accused through inference and innuendo of being a thief. Since Metropolitan did not appear before the referee to contest the debt, appellee's discharge in bankruptcy will not only erase this debt but hopefully will remove the unwarranted stigma that operates as an albatross around his neck. Although there is no way for Mr. Kras to prevent Metropolitan from giving appellee an unfavorable reference even after he is discharged, the fact that Metropolitan made no attempt to prove fraud and thus have the debt survive a bankruptcy discharge (11 U.S.C. §§35(a)(4) and 35(c)(2)) hopefully will not be without significance to a prospective employer.

E. Overriding Governmental Interests

We regard as frivolous appellant's suggestion that the pure money interest in placing the bankruptcy system on a self-supporting basis[9] can be of sufficient constitutional significance to override Mr. Kras' fundamental due process right to be heard.[10] See *Fuentes v. Shevin*, 40

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[9]It is not unlikely that when Congress amended the Bankruptcy Act in 1946 to abolish the in forma pauperis bankruptcy petition and established in its place the installment payment option it simply overlooked the possibility that an individual like Mr. Kras might be so severely indigent as to be unable to meet the fee requirements on lenient installment terms.

[10]The government has wisely refrained from advancing as justification an interest in discouraging frivolous and fraudulent bankruptcy petitions. There is no connection between a bankruptcy petitioner's ability to pay the filing fee and the seriousness of his motives and it is undisputed that Mr. Kras seeks a discharge in good

U.S.L.W. 4692, 4699 n. 22, 4700 n. 29 (1972); *Stanley v. Illinois*, 40 U.S.L.W. 4371, 4375 (1972); *Bell v. Burson*, 402 U.S. 535, 540-41 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). See also *Griffin v. Illinois*, 351 U.S. 12 (1956).

In any event the conclusions which the Government draws regarding the impact of the present case upon the financing of the bankruptcy system do not follow from the facts it presents. The government observes that more than 64% (107,481) of the 1969 non-business bankruptcies were cases in which although the bankrupt had no non-exempt assets he was able to pay the filing fee (Brief, p. 20). The power and the authority of the bankruptcy system to continue to collect the filing fees from indigents who, like the 107,481 in 1969 were able to pay them at least in small installments, would be unimpaired by a decision allowing Mr. Kras and similarly situated individuals, who not only have no non-exempt assets but lack sufficient other assets to pay the filing fees even in

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faith. Since no objecting creditor appeared at the first and only meeting of creditors it is clear that but for the filing fee requirement Mr. Kras could obtain an immediate discharge of all his scheduled debts. It also should be noted that the potential for abuse which exists whenever filing fees are waived on the basis of an affidavit of indigency is less in this context because of the referee's on-going inspection of a bankrupt's financial condition than in other areas of civil actions where 28 U.S.C. § 1915 applies. *In re Kras, supra*, 331 F. Supp. at 1213.

small installments, to be discharged without payment of the filing fee.[11] Accordingly, the granting of relief to Mr. Kras will have a minimal impact on the fiscal status of the bankruptcy system,[12] which has been operating at a substantial deficit since 1966.[13]

In sum, upon careful legal analysis of the underlying rationale of this Court's decision in *Boddie*, the conclusion is inescapable that the present case is constitutionally indistinguishable from *Boddie*.[14]

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[11] The Government boldly asserts that $3,000,000 is the measure of the potential monetary loss in allowing indigents generally to avoid paying the filing fees. No attempt is made by the Government to prove that the $3,000,000 figure is in fact the added cost of allowing indigents in Mr. Kras' severe circumstances to avoid the fees.

[12] It is appalling and ironic that the Government in the very proceeding designed to afford some measure of relief insists that Mr. Kras continue living in an intolerable situation.

[13] $4,531,466 in 1970 alone. Administrative Office of the United States Courts, Tables of Bankruptcy Statistics (1970). See *In re Kras, supra*, 331 F. Supp. at 1214.

[14] This same conclusion has been reached by at least nine lower federal courts which have considered the question. *In Matter of Beeman*, Nos. 14810 & 14811 (D. Ct. Conn., May 22, 1972); *In Matter of Smith*, No. 71-B-7497 (N.D. Ill., April 28, 1972); *In Matter of Ripley*, No. Bk71-0-1003 (D. Ct. Neb., Referee Strasheim, April 28, 1972); *In Matter of Shropshire* (N.D. Iowa, March 28, 1972); *Application of Ottman*, 336 F. Supp. 746 (E.D. Wisc., 1972); *In Matter of Passwaters*, Nos. 1P70-B-3697, 8 (S.D. Ind., Nov. 30, 1971); *In Matter of Read*, No. Bk71-826 (W.D.N.Y., Referee McGuire, October 19, 1971); *In re Naron*, 334 F. Supp. 1150 (D.Ct. Ore., 1971); *In re Kras, supra*. But see *In Matter of Partilla*, No. 71-B-380 (S.D.N.Y., Referee, Babitt, Oct. 15, 1971); *In Matter of Malevich*, No. Bk29-71 (D.Ct. N.J., April 21, 1971).

II.

THE BANKRUPTCY FILING FEE REQUIREMENT VIOLATES APPELLEE'S FIFTH AMENDMENT RIGHT TO ACCESS TO COURT.

We think that the issue here is *not* whether the 'right' to divorce or bankruptcy discharge is more or less important or whether there is some conceivable extra-judicial method for obtaining relief. We submit that there is only one right at issue in this case and that is the right to access to the courts. That right, we insist, must be equally available to all individuals who seek it and not depend upon the greatness or smallness of the particular action pleaded.

If the phrase "due process of law" is to have any substantive content, it must include the requirement that the doors of the courthouse be open and relief available to all litigants regardless of their ability to meet costs or expenses–so long as such relief is not in derogation of some higher social policy[15] or paramount right held by someone else.[16]

In *Powell v. Alabama*, 287 U.S. 45, 65 (1932), this Court said:

> "One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common

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[15]Contrary to Appellant's suggestion, a presumed congressional intent to place the bankruptcy court on a 'self-supporting' basis cannot be regarded as a constitutionally recognizable higher social policy than access to the courts.

[16]The 'security-for-costs' cases (Appellant's Brief, pp. 24-25) upon which Appellant relies fall into this category.

> law and statute law of England before the Declaration of Independence, subject however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation."

Applying this test, we see that the right asserted here was an integral part of the common law of England and brought forward into the law of this Nation upon the highest authority.

The first extensive "poor person" statute was enacted in 1495 (11 Hen. VII, c. 12; 2 Stat. of the Realm 578). It provided:

> . . . ever pouer persone or persones which have, or hereafter shall have cause of accion or accions ayenst any persone or persones within this realme shall have, by the discrecion of the Chauncellor of this realme, for the tyme being writte or writtes originall and writtes of sub pena, according to the nature of their causes, therefor nothing paieng to your Highness fot the seales of the same, nor to any persone for the making of the writte & writtes to be hereafter used. And that the said Chanucellor for the tyme being shall assign such of the Clerkis whiche chall doo and use the making and writing of the same writtes to rite the same redy to be sealed, and also lerned councell and attorneys for the same, without any rewarde taking therefor . . . "[17]

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[17]A century later, Elizabeth I, in her Instructions for the Lord President, and Council of the North (1603), directs:

> "XIX. And the Lord President or Vice President may appoint counsellors, attorneys, and process for any poor person so that their cause may proceed without charge."

Quoted at p. 368, Prothero, Select Statutes & Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I (4th ed., Oxford). See also, 23 Hen. VIII, c. 15 (1535).

The English courts have held that this statute was merely "confirmatory of the common law." Tindall, C.J., in *Brunt v. Wardle*, [1841], 3 Man. & Ct. 534, at 542, 133 Eng. Rep., Full Reprint, 1254, at 1257. Similarly California has held the statute of Henry VII to represent a common law doctrine absorbed into the common law of California, (*Martin v. Superior Court*, 176 Cal. 289 [1917]) and Professor Maguire has found in the Reports of the Seldon Society a common law tradition similar to and long antedating the statute of Henry VII. See, Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361 (1923).

Indeed persuasive indication of absorption of the common law doctrine into American jurisprudence is in the Revisal of the Laws of Virginia, Bill No. 112. This section, the preamble of which was drafted by Thomas Jefferson and introduced in the Virginia Assembly by James Madison, provided:

"112. A BILL PROVIDING A MEANS TO HELP AND SPEED POOR PERSONS IN THEIR SUITS

Where it is intended that indifferent justice shall be had and administered to all the citizens of this commonwealth, as well as to the poor as rich, which poor citizens be not of ability, nor power, to sue according to the laws of this land for redress of injuries and wrongs to them daily done, as well concerning their persons and their inheritance, as other causes; For remedy whereof, in behalf of the poor persons of this land not able to sue for their remedy after the course of the law, Be it enacted by the General Assembly, that every poor person which shall have cause of action against any person within this commonwealth, shall have, by the discretion of the courts before whom he would sue, writ or writs original, and writs of subpoena, according to the

nature of his case, nothing paying for the same; And that said court shall direct their clerk to issue the necessary process, shall assign him counsel learned in the laws, and appoint all other officers requisite and necessary to be had for the speed of said suit to be had and made, who shall do their duties without any regard for their counsels, held and business in the same."[18]

The earliest equivalent expression in the laws of New York was c. 90 sec. XXI of the Laws of 1801 (Kent & Radcliff ed.) which provided:

> . . . every poor person not of ability to sue and who shall have cause of action against any person, shall have by the discretion of the chancellor writs original or writs of subpoena, without paying for the same; and if the suit is to be prosecuted in the court of chancery, the chancellor shall assign to such poor person solicitors and counsel and all other officers, requisite for prosecuting the suit, who shall do their duty therein without taking any regard for the same . . . and in case any such plaintiffs be non-suited, or a verdict or judgment be given against him, he shall not be compelled to pay any costs in such action."[19]

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[18] The Papers of Thomas Jefferson, vol. 2, p. 628 (Princeton 1950); Virginia Acts of 1786, c. LXV; 12 Statutes at Large of Virginia 356-357 (Henning, 1785-88).

[19] Similar statutes were enacted in New Jersey (Laws of New Jersey, 339 (Patterson, 1800)), and the Colonial South Carolina statute (S.C. Acts of 1712, No. 321) was continued in force after Independence (Stat. at Large of S. Carolina, 456-462 [1837]). Georgia, Pennsylvania and Maryland courts all considered the forma pauperis statutes of Henry VII and Henry VIII to be part of the common law and effective in their respective states. See, W. Shley, *Digest of English Statutes in Force in Georgia*, 144-146 (1826); W. Kitty, *A Report of English Statutes in Force in Mary-*

Thus at the time of the ratification of the Constitution, the notion of equal access to the courts was accepted as an integral part of the common law, and this common law principle, essentially for the benefit of civil litigants, was found to be within the original thrust of the Fifth and Fourteenth Amendments' due process clauses. Mr. Justice Field, writing for a unanimous court, put it this way:

> "The Fourteenth Amendment intended . . . that all persons should be entitled to pursue their happiness and acquire and enjoy property; that they should have *like access to the courts of the country for the protection of their persons and their property, the prevention and redress of wrongs, and the enforcement of contracts." Barbier v. Connolly*, 113 U.S. 27, 31-32 (1885). (emphasis added)

See also, *Truax v. Corrigan*, 257 U.S. 312, 330-334 (1921). *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

Recent decisions of this Court have followed in this tradition, although in applying these principles to the criminal law greater emphasis has been given to the equal protection aspects of the Fifth and Fourteenth Amendments. One of the earliest and perhaps most significant cases in this area is *Griffin v. Illinois*, 351 U.S. 12 (1956). There the Court held that the State must provide without costs an appeal transcript to an indigent prisoner. The *Griffin* decision broadened the dimensions and added new perspectives to the concept of equal protection. The

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land, 229 (1811); 3 Binn. [Pa.] 617, 618 (1808). Rhode Island seems to have rested *its* common law forma pauperis practice on Section 40 of the Magna Carta. See, *Spaulding v. Bainbridge*, 12 R.I. 244 (1879), and New Hampshire simply charged no litigant. See, *Senter v. Carr*, 15 N.H. 375 (1844).

Illinois statute was struck down despite the fact that it was neutral on its face, did not suffer from overclassification or underclassification, and lacked any ulterior discriminatory intent or motive.

Subsequent to *Griffin* this Court further required the State to provide an indigent with a free transcript of preliminary hearing minutes, *Roberts v. LaValle*, 389 U.S. 40 (1967), and with a free transcript of trial proceedings, *Eskridge v. Washington, State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958), and waived the filing fee requirements for a motion for leave to appeal, *Burns v. Ohio*, 360 U.S. 252 (1959), and for habeas corpus petitions, *Smith v. Bennet*, 365 U.S. 708 (1961).

This Court's emphasis in *Griffin* and its progeny upon an equal protection analysis, rather than upon the due process right of access to court, is perhaps explained by the nature of the interests at stake in those cases. None of the cases involved bare access to the court in the first instance. Rather, they involved either access to court at the appellate level or access to the legal instruments realistically need to vindicate legal rights once initial access to court had been obtained.[20]

In conclusion, whether we speak of due process or equal protection as being the operative concept is of little moment. Due process requires that all persons have access to the courts in order to be heard on their claims; equal protection requires that the poor have the same access as those financially more advantaged. Neither theory

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[20]Both are matters of statutory entitlement and, unlike the due process right of access to court, are not independently protected constitutional rights.

permits access to be denied a person because of his financial status.[21]

CONCLUSION

For the above reasons the Decision and Order of the District Court should be affirmed.

Respectfully submitted,

KALMAN FINKEL
The Legal Aid Society

Attorney for Appellee

On the Brief:
JOHN E. KIRKLIN
LEON B. POLSKY

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[21] We would be less than candid if we did not acknowledge that under this analysis all filing fee requirements which bar an indigent's initial access to courts must fall. This result will do little more than place on a constitutional footing what many states have already done either by statute or in recognition of the common law. See National Legal Aid and Defender Association *Amicus Curiae Brief* in *Boddie v. Connecticut*, Appendix A.